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No. 545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

PACIFIC SUPPLY COOPERATIVE,
Petitioner,

v.

FARMERS UNION CENTRAL EXCHANGE, INCORPORATED, and NATIONAL COOPERATIVES, INC.,
Respondents.

ANSWER OF NATIONAL COOPERATIVES, INC. TO PETITION FOR WRIT OF CERTIORARI

ORVILLE H. MILLS
Suite 656 Central Building
Seattle 4, Washington

and

IRVING M. TULLAR
425 Thirteenth St., N. W.
Washington, D. C. 20004

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To The Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

National Cooperatives, Inc., one of the respondents to the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, opposes the granting of the petition.

OFFICIAL REPORTS

Petitioner's brief omits citation of the District Court's oral decision denying amendment of the Third Party Complaint. Such oral ruling is set forth as Appendix A.

Petitioner's brief also omits citation of portions of the District Court's oral decision determining the issue of

exclusiveness and pendent unfair competition, as to National, as a matter of law. Such omitted ruling is set forth as Appendix A-1.

QUESTIONS FOR REVIEW

The "Questions Involved," as presented by the petition, do not arise out of the record of this case, and do not present, with accuracy, brevity, and clearness, the matters essential to a ready and adequate understanding of the case. On this ground alone, the Court has sufficient reason to deny the petition (Court Rule 23, (4)).

Stripped of arguments and unsupported assumptions of fact, Petitioner is actually asking this Court to determine:

1. Whether there existed such a genuine issue of fact on the claimed exclusive license, as to render the District Court's granting, and affirmance by the Court of Appeals, of summary judgment and disposition of such claim, as an issue of law, a denial of due process.

2. Whether dismissal by the District Court of the claims of trade mark infringement and pendent unfair competition, and affirmance thereof by the Court of Appeals, was justified under the Lanham Trademark Act.

3. Whether dismissal of National on the issue of inducement to breach of contract by the District Court under Rule 41(b), and affirmance thereof by the Court of Appeals, constituted denial of due process of law.

STATEMENT OF THE CASE

Respondent, National, cannot accept petitioner's statement as full, fair or correct. Stipulated facts are ignored; factual references are unsupported by the record; there are vital and essential omissions; self serving documents, striken from the record for violations of the Court's direc-

tives, are cited as factual references; and argument and inference are mixed with factual statement.

Faced with this same situation, the Court of Appeals stated:

> "Appellee National, critical of appellant's factual statement, lists certain stipulated facts, quoting the record and citing transcript page numbers for each statement made. Pacific denies that such stipulated facts are 'controlling' (Reply Br. P. 3) (as they are characterized by National), but does not dispute in any way the correctness of the stipulated facts so referred to. For that reason, we adopt such statement with its references to the record:—" (Pet. A4).

A. SUBSTANTIVE

Stipulated facts on organization, history, use of trademarks and dealings of the parties are set forth in full in the record (R 1451-1460; 9010-9028; 9208-9210). Relevant minutes and by-laws of National are stipulated (R 742-794). Relevant minutes of respondent, Farmers Union Central Exchange, and petitioner are stipulated (R 795-827; 828-866). Trademark records are stipulated (R 919-934; 1709-3038), among which are the facts that Nation ". . . is the record owner of Forty-Two (42) United States Trademark registrations including 'Co-op,' 'Capri,' 'Universal' and others" (R 919-929); and as to those trademarks assigned, the record owner of ". . . all right, title and interest in and to said marks, the registration thereof, and the good will of the business symbolized thereby;" (R 929) and the owner of State Trademark registrations covering "Co-op," including fifteen (15) Registrations in the states of Idaho, Oregon and Washington (R 930-932).

Petitioner has conceded, there is no formal agreement giving any exclusive license (R 9030). Petitioner has conceded incontestability of trademarks (R 8925; 9266). Pe-

titioner has also conceded, there is no agreement for division of territory (R 8886-8887).

B. PROCEDURAL

Petitioner (Pacific), whose General Manager was fully informed of the affairs of National as a member of the Board of Directors of National since 1935, filed a forty-five (45) page Complaint against Farmers Union Central Exchange (FUCE) on January 30, 1959, with twenty-seven (27) additional pages of appended exhibits (R 1). In denying FUCE's Motion to Dismiss the Complaint on the ground of prolixity, Judge Lindberg ruled that FUCE could answer despite the prolixity, indicating other District Court Judges might well grant the Motion (R 9404).

Pacific and FUCE engaged in discovery procedures until November 13, 1959, when Pacific filed a Supplemental Complaint (R 193). FUCE then filed a Motion For Partial Summary Judgment (R 220) which, in part, was granted failing the joinder of National as owner of the trademarks (R 455).

National was not charged with any wrong in either the Complaint or the Supplemental Complaint (R 1; 193).

Pacific filed a Third Party Complaint joining National on September 28, 1960. It purports to incorporate by reference the aforementioned criticized Complaint and the Supplemental Complaint, in toto (R 459).

National filed a "Notice of Possible Protracted Case," and requested a preliminary conference on October 28, 1960 (R 550). A preliminary pre-trial conference was had on November 22, 1960, following which the Court ordered, in part: a preliminary pre-trial conference; all discovery proceedings placed under the control of the Court; and the preparation of, and filing of a clear and concise statement of contentions upon the issue of the alleged exclusive right and license claimed by Pacific (R 570).

Two days were then devoted to a pre-trial conference on February 8, and 9, 1961 (R 8998). At this conference, the Court reserved its right under the existing order,

> "to continue to supervise further discovery proceedings, and none will be allowed until the issues are clarified and a motion made and a showing of the parties who *desired* further discovery. * * * " (R 8999)

None of the parties made a motion for, or a showing in support of discovery (R 8998-9007).

A third pre-trial conference was held on April 21, 1961, (R 9008-9087) during which the Court defined the basic issues (9082). After denying Pacific's request to tack alleged prior use of certain trademarks, the Court also set May 18, and 19, 1961, as the time for the fourth pre-trial conference, and October 30, 1961, for trial (R 9083-9085); it being agreed by counsel that National's records would be made available for inspection and copying in the interim. No other request for discovery was made (R 9008-9087).

Counsel for FUCE, Pacific and National spent four (4) days in Albert Lea, Minnesota, reviewing National's records on May 2-5, 1961, where, in the language of Pacific's counsel, Pacific

> "was given a full and, I think, a rather liberal access to the records of National * * *." (R 9101)

The fourth pre-trial conference was held for two (2) days commencing on May 18, 1961 (R 9088-9128). At that meeting, counsel agreed upon procedures for the final framing of issues, and counsel were directed to meet on June 14, and 15, 1961, to effect these procedures (R 9099-9100). In addition, the Court scheduled the fifth pre-trial conference for July 6, and 7, 1961 (R 9127-9128). No formal request for discovery was made (R 9088-9128).

Counsel met in Yakima, Washington, on direction of the Court, and entered into a plurality of stipulations (R 9132-9135). These stipulations included the minutes of National and its by-laws (R 742-794; 9642). All articles and by-laws of National had been produced for Pacific on June 14, and 15, 1961, pursuant to agreement (R 9089; 9133). Certified copies of articles with all amendments were secured by National for Pacific's benefit, together with printed copies of by-laws, and were available and reviewed for the stipulation (R 9628-9629).

Following this meeting, the Court held the scheduled fifth pre-trial conference, (R-9129-9283) where additional stipulations were entered into (R 9208-9209).

During the course of the July pre-trial conference, Pacific suggested it might want "a few admissions," or "to produce a few things" or "little things," and the court said:

> "* * * I think the way was left open for any of the parties who wanted discovery to make an application and a further showing of what they wanted to get, and if they made the application I could tell if it is advisable." (R 9231-9233)

The Court also suggested a time subsequent to August 11, 1961, for the sixth pre-trial conference. This conference was subsequently set to commence on August 24, 1961 (R 9284).

Pacific failed in compliance between July 6, 1961, and August 24, 1961, with the Court order to file a statement of relevancy and materiality of exhibits, and the non-complying document was striken (R 1244).

Pacific also violated the Court order staying discovery proceedings by serving and filing on August 7, 1961, without application for or leave of Court obtained for such discovery procedure, a one hundred fourteen (114) page Request For Admissions of Facts and Genuineness of

Documents, denominated as pursuant to Rule 36, F.R. C.P. (R 1069-1183). The demand was stricken (R 1244).

The defendants filed motions for the advance Determination of Legal Issues. The need for such determination had been indicated by counsel and the Court (R 9195-9197).

During the pre-trial conference commencing on August 24, 1961, the Court heard the motions of Pacific, FUCE and National (R 9284-9642). The hearing, and the entry of the Order and Judgment on the motions was on February 21, 1962 (R 9643-9696). Pursuant to, and in accordance with Rule 41(b), 52(a) and 54(b), F.R.C.P., the Court:

> "* * * ascertained that the facts existing without substantial controversy are set forth in the filed stipulations of the parties, in the agreed statements of facts in the record and in the filed admissions. * * *" (R 1247)

Having adopted these admitted facts of the parties, the Court further found and ruled: (R 1247-1250)

(As to the Issue of Inducement to Breach of Contract)

1. "* * * the Third Party Complaint is inadequate to charge the Third Party Defendant with any claim on account thereof; * * *"
2. "* * * the Plaintiff's Statement of Issues and Contentions made in the course of pre-trial proceedings are inadequate to state any claim against the Third Party Defendant * * *"
3. "* * * Plaintiff's Amended Third Party Complaint offered in the course of pre-trial proceedings and denied, is inadequate to state any claim against Third Party Defendant * * *"
4. "* * * there is no genuine issue of material fact thereon; * * *"

5. "* * * the General Manager and Secretary of Plaintiff corporation has from the time of inception of this action and before, been the president of the Third Party Defendant corporation and matters relating to such issues of inducement to breach, fraud, aiding, abetting, and conspiracy, were known to Plaintiff at the time of the original Complaint and the Supplemental Complaint and before the filing of the Third Party Complaint and at all times during pre-trial proceedings and conferences; * * *"

6. "* * * assertions made on behalf of Plaintiff on oral motion for leave to amend at the time of hearing herein, which motion is hereby denied, are inconsistent with the record as made by Plaintiff by its pleadings, its Statement of Contentions and its representations in connection with pre-trial proceedings herein."

(As to the Issue of Exclusiveness)

7. "* * * the Third Party Defendant is the owner of all trademarks and tradenames in issue; * * *"

8. "* * * Plaintiff is a licensee of Third Party Defendant; * * *"

9. "* * * as such a licensee Plaintiff cannot acquire adverse rights against its licensor; * * *"

10. "* * * the rights of Third Party Defendant are incontestable under the Lanham Act; * * *"

11. "* * * Plaintiff has only such rights in trademarks and tradenames of the Third Party Defendant as are granted by the Articles and By-Laws of Third Party Defendant which grant to all members of Third Party Defendant equal and non-exclusive rights; * * *"

12. "* * * Plaintiff has failed to produce or show in the course of pre-trial proceedings any matter which would vary or change such non-exclusive rights or

raise any genuine issue of material facts thereon; * * *"

13. "* * * the issues of Trademark and Tradename Infringement and Pendent Unfair Competition or Pendent Unfair Trading, are governed by the Lanham Act."

(As to 54(b))

14. "* * * that judgment should be entered immediately as to one or more, but fewer than all, of the claims or parties * * *"

15. "* * * that there is no just reason for delay; * * *"

16. "* * * that there is no genuine issue of material fact as to any of the matters covered by such judgment."

Pursuant to such findings and rulings, the Court adjudicated:

1. "* * * Third Party Defendant's Motion to Dismiss under Rule 41(b) be and the same is granted as to, and Third Party Defendant is dismissed as to, the claims of the Plaintiff based upon inducement to breach of contract, fraud, aiding and abetting and conspiracy and Third Party Defendant's Motion to Determine Issue of Inducement of Breach and for Dismissal of Claims based thereon be and the same is hereby granted, * * *"

2. "* * * Third Party Defendant's Motion to Determine Issue of Exclusiveness and for Dismissal of Claims Based Thereon be and the same is hereby granted, and Third Party Defendant's Motion to Determine Issue of Trademark Infringment and Pendent Unfair Competition and for Dismissal of Claims Based Thereon be, and the same is hereby granted."

3. "* * * It is Ordered and Adjudged that the Third Party Complaint be and the same is hereby dismissed with prejudice * * *"

Thus, this Honorable Court is being asked to consider on petition an affirmed Judgment and Order dismissing National after at least four (4) formal hearings on motions, (R 455; 570; 1242-1250; 9404) the expenditure of almost three weeks time in seven (7) pre-trial conferences or meetings (R 570; 1242), and the accumulation of over Nine Thousand Seven Hundred (9,700) pages of record.

ARGUMENT

Grounds of Opposition

The decision of The Court of Appeals is not in conflict with the decision of another Court of Appeals on the same matter; said Court has not decided an important question of federal law which has not been, but should be, settled by this Court; said Court has not decided a federal question in a way in conflict with applicable decisions of this Court; nor has said Court departed from the accepted or usual course of judicial proceedings or sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision.

The decisions of the District Court and the Court of Appeals are fully supported by law and facts requiring denial of certiorari. Such decisions are supported by principles of general law, including contract law and estoppel. These principles of general law, as applied to the facts of this particular case, so affect considerations as to render any decision of this Court of no ultimate general or broad application.

A. NO CONFLICT

Contrary to the petitioner's erroneous contention and misplaced reliance, the decision of the Court of Appeals is not in conflict with the Court of Appeals for the Second Circuit in *Huber Baking Company* v. *Stroehmann Bros.*,

CA2, 1958, 252 F.2d 945. The Huber case is clearly distinguishable, and has been distinguished, *on the facts*, by the Court of Appeals and by the respondents.

The petitioner misapplied or misinterpreted the case in seven instances in its brief before the Court of Appeals. However, the facts were distinguished in National's brief, page 53, and in Farmers Union Central Exchange's brief. Notwithstanding the distinguishing facts and the inapplicability of the case, the petitioner relied on *Huber Baking Company* v. *Stroehmann Bros.* in its Reply Briefs.

In its well-considered opinion, the Court of Appeals herein, after noting that the *Huber Case* expressed an exception to the general rule, made a careful analytical comparison of the facts of the two cases. The itemized differences in the facts, broadly and specifically, distinguish the facts of the two cases beyond a doubt. (Pet. A28-33) Thus, the determination of the petitioner's misplaced reliance upon; the lack of conflict with; and the complete inapplicability of the *Huber Case* to any facet of this petition is clearly established.

B. NO IMPORTANT FEDERAL QUESTION

The Court of Appeals has not decided an important question of federal law which has not been, but should be, settled by this Court.

The petitioner misrepresents to this Court that the Courts below misinterpreted and misapplied certain provisions of the Lanham Act. The ever-shifting arguments and contentions of the petitioner, did not raise the questions, as presented herein, before the District Court. On the contrary, the petitioner stipulated that certain trademarks had become incontestable under the Lanham Act (R. 272-273; 288; 1316; 8925; 9266). Therefore, the petitioner should not now be heard to argue "title", a

question of state, not federal law, under the guise of the Lanham Act.

The petitioner erroneously suggests that, because Section 15 was not raised in *Huber Baking Company* v. *Stroehmann Bros.*, supra, there is a lack of color of merit to the holding of the Courts below in this regard. What the petitioner fails to appreciate, is the fact that the registration there in issue was not elligible for a claim under Section 15. In the *Huber Case*, the registration was issued under the provisions of the 1905 Act; was not republished under the provisions of Section 12(c) of the Lanham Act (15 U.S.C. 1062(c)) until March 14, 1950; was involved in litigation less than three years later (*Huber Baking Company* v. *Stroehmann Bros. Company*, U.S.D.C., S.D. N.Y. Feb. 27, 1953, 114 F. Supp. 411); and it was barred from a claim of incontestability under Section 15(2) of the Lanham Act (15 U.S.C. 1065(2)).

Aside from the petitioner's erroneous "incontestable" argument, it also claims rights through use by its predecessors prior to the organization of National. Such a claim is factitious and without merit where, as here, petitioner stipulated that its predecessors had obtained their trademarked goods from National's predecessors (R 1451-1453; 9010-9015). It was upon this basis that the District Court denied petitioner's claim to prior use (R 9083-9085).

The petitioner also fails to recognize that Section 32 of the Lanham Act (15 U.S.C. 1114(1)) limits a cause for trademark infringement "* * * to a civil action by the *registrant* for any or all of the remedies herein provided * * *" (emphasis added). Where, as here, the petitioner stipulated that National is the record owner of the trademark registrations in issue, (R 919-929; 930-932) the Courts below had no statutory alternative to the dismissal of the charges that National was infringing its own trademarks.

The petitioner now urges that this Court should clarify the rights in the "related company" and the "collective" mark provisions of the Lanham Act. This "turnabout" is surprising in view of the petitioner's representation to the District Court that, ". . . We are not challenging National's right to the collective mark, to continue to control the collective mark. We have no controversy with National, whatsoever" (R 8899).

Other than the fact that a related company's use inures to the benefit of the registrant, as ruled by the Court of Appeals (Pet. A 26), no federal question is involved. Moreover, the particular facts of this case, as stipulated by the petitioner and established in the ninety seven hundred (9,700) pages of record, could never serve as a basis for a decision which would be a guide or precedent to the business community.

That the decision of the Court of Appeals was not in conflict with applicable decisions of this Court, warrants only passing affirmance. This point was not argued or presented in the petition.

C. SUPERVISION NOT REQUIRED

The Court of Appeals has not departed from accepted or usual course of judicial proceedings or sanctioned such departure by the District Court, as to call for an exercise of this court's power of supervision.

Petitioner, by asserting the contrary, undertakes the burden to establish affirmatively:

1. The determination and dismissal of the issue of exclusiveness was such a departure as to constitute denial of due process;

2. The denial of amendment and dismissal of the third party complaint was such a departure as to constitute denial of due process.

Neither by citation of fact or law, has petitioner established either proposition.

I. DETERMINATION AND DISMISSAL OF ISSUE OF EXCLUSIVENESS

Petitioner's assertion of exclusive rights, both as to origin and territory, has shifted and changed throughout these proceedings.

Initially, exclusive rights in the seven states of Utah, Nevada, California, Montana, Idaho, Oregon and Washington were boldly asserted (R 4). Later, Wyoming was added (R 307). Exclusive claims as to Utah, Nevada and California fell when stipulated facts established competition in those areas (R 9208-9210). Claims as to exclusiveness were further diluted by stipulation showing sales records of Farmers Union Central Exchange of both trademarked goods and petroleum products in Montana since 1939, (R 883; 906); in Idaho since 1943, (R 875; 876; 895; 896) and in Wyoming since 1943 (R 868; 886). Thus, assertions of petitioner in this court are now made only as to Washington, Oregon and Idaho. However, in earlier candor, petitioner conceded there never has been any agreement for division of territory (R 8886). Petitioner's assertion of exclusiveness confuses lack of competition resulting from economic barriers with exclusive rights at law.

Initially, exclusive rights were based on bold assertion of "grant." (R 4). Later, petitioner conceded there was no grant or formal agreement (R 9030). Still later, it was contended all rights "* * * merged into and became a part of the Caldwell Agreement * * *" (R 1391). As the Court of Appeals demonstrates, (Pet. A18-21, A28) the Caldwell Agreement establishes no exclusive trademark right in petitioner, but, rather, creates and permits competing marketing organizations within the area claimed by petitioner. Finally, at the late date of the Pe-

tition herein, petitioner bases its claims to exclusive rights upon a " * * * course of conduct over a 20-year period. * * * " (Pet. 17). No factual reference is given for such assertion. No factual reference is given for petitioner's further assertion, that it had presented " * * * cogent evidence in support of its claim that National by a consistent course of conduct had recognized Pacific's claim to exclusive use of trademarks." Only one factual citation to an uncontrolling letter is given in argument upon this point. This same letter, coupled with other references, led the Court of Appeals to its conclusion, " * * * that right was never recognized by any consistent course of conduct between the parties to this litigation—nor any unequivocal acknowledgement in writing by appellees that appellant's position was correct. The opposite occurred. Thus, no exclusive right was created, even impliedly, by action of the parties" (Pet. A 33).

The District Court found that the articles and by-laws of National constitute a contract, a point conceded by petitioner (R 9481; App B. 58). In the District Court, petitioner sought to maintain that this contract gave petitioner exclusive rights (R 9481). From inception in 1935, the by-laws provided for the use of trademarks by members in "competing territory" giving equal and non-exclusive rights. The last amendment of by-laws in 1946 provides for use by all members of trademarks without limitation of territory of such use. The District Court and the Court of Appeals quite properly held that the by-laws of National grant non-exclusive rights to all members, to use its trademarks anywhere. *Stevenot* v. *Norberg*, CA 9, 1954, 210 F. 2d 615.

Apart from the Lanham Act, petitioner represented to the United States Patent Office that the trademark Co-op belonged to National (R 2880; 8890-8891; 9074). Under theory of evidential estoppel or estoppel in pais, petitioner cannot challenge the right of National to control the use

of the trademark. This position is recognized by the Court of Appeals, citing *Holly Hill Citrus Growers' Assn.* v. *Holly Hill Fruit Products, Inc.*, CA 5, 1935, 75 F. 2d 12.

Petitioner states in this court,

> "The only equality of membership in National among its 26 regional cooperative members is uniformity of inequality" (Pet. 6).

Yet, Petitioner has factually stipulated,

> "The membership of National is now composed of 26 regional wholesale cooperatives with equal rights * * *" (R 1454; 9016-9017).

The District Court, after most patient consideration and every opportunity to petitioner to show any grounds for its claim of exclusiveness, concluded that it had failed to produce or show in the course of pre-trial proceedings any matter which would vary or change non-exclusive rights, or raise any genuine issue of material fact. The Court of Appeals, after careful consideration, has affirmed such conclusion. *Holcomb* v. *Aetna Life Insurance Co.* CA 10, 1958, 255 F. 2d. 577; Cert. den. 1958, 358 U.S. 879, 79 S. Ct. 118; *Appalachian Power Company* v. *American Institute of Certified Public Accountants*, 1959, 80 S. Ct. 16, 4 L. Ed. (2d) 30.

II. DENIAL OF AMENDMENT AND DISMISSAL OF THIRD PARTY COMPLAINT

In argument upon this subject, petitioner refers to amendment proposed July 6, 1961 (R 911). This amendment the court denied, with the following reservation:

> "* * * I think you might do this in order to complete the record, if you feel there is something else when the pre-trial orders are completed that hasn't been incorporated as an issue in the case, that you may submit it and it may be ruled on again.

MR. SHERWOOD: At the time of pre-trial?
THE COURT: So the motion to amend is denied." (R 9281)

Thereafter, the petitioner did not renew such motion in the course of the pre-trial proceedings of August 24, 1961, at which the court ruled upon the issue of exclusiveness and pendent unfair competition (R 9492-9495; 9500-9508; 9517). It rested such argument upon the third party complaint.

After such rulings, petitioner was asked to state if its pleadings were sufficient to stand against National on the issue of inducement to breach of contract. Counsel for petitioner quite frankly stated that the only thing National had done was to furnish goods to Farmers Union Central Exchange (R 9529-9530).

Despite such admission, petitioner renewed its motion for leave to amend on the issue of inducement to breach of contract (R 9549; 9551).

It stated that it was content to rest on the allegations of the proposed third party complaint (R 9606; 9608).

Upon such record, the District Court ruled as to the issue of inducement to breach of contract that the Third Party Complaint was inadequate to state any claim against National; Plaintiff's Statements and Contentions and proposed amendment in course of pre-trial proceedings were inadequate to state any claim against National; no genuine issue of fact existed. The Court granted National's motion to dismiss under Rule 41(b) upon the issue of inducement to breach and the motion of National to determine such issue and for dismissal of claims based thereon (R 1248-1256).

The record of the District Court, affirmed by the Court of Appeals, shows patient and careful consideration with full opportunity to petitioner to frame the issues properly.

There has been no departure from the accepted or usual course of judicial proceedings to call for exercise of this court's power of supervision. *Link* v. *Wabash Railroad Company*, 1962, 370 U.S. 626, 82 S. Ct. 1386.

D. PETITIONER'S NON-COMPLIANCE

Petitioner, in the District Court, disregarded admonitions and orders of the court resulting in the striking of two documents, (R 1244) and the invoking of application of Rule 41(b) (R 1248-1250). The motion could, and should have been granted as to all matters save for prior ruling on disposition of the issue of exclusiveness (R 9626; 9628). Petitioner's violations of Rule 18(e) and (i) of the Court of Appeals brought severe criticism from that court (Pet. A 3).

The petition fails to present, with accuracy, brevity, and clearness, the matters essential to a ready and adequate understanding of the case.

For such continuing conduct, there is reason to deny the petition (Court Rule 23, (4)).

CONCLUSION

The District Court and the affirming Court of Appeals rendered their decisions only after a careful and complete consideration of a voluminous record. The petitioner has not shown wherein the courts below erred. None of the considerations stated in this Court's Rule 19 for granting a review on writ of certiorari are supported by the record. There are no special and important reasons which should move this Court to exercise its descretion to review this case. The petition should be denied.

Respectfully,

ORVILLE H. MILLS
Suite 656 Central Building
Seattle 4, Washington

and

IRVING M. TULLAR
425 Thirteenth St., N. W.
Washington, D. C. 20004

APPENDIX A

R 9281

THE COURT: Well, I think the time has come when we have to start cutting down rather than enlarging the issues in a case of this kind, so I do think that the pre-trial order, when finally framed, will incorporate all the issues, and I feel that in going over these, I haven't gone over them in detail recently as much as you gentlemen have, but I think that there is nothing to be added by permitting the amendment and I feel that the amendment should be denied. The record is made. I think you might do this in order to complete the record, if you feel there is something else when the pre-trial orders are completed that hasn't been incorporated as an issue in the case, that you may submit it and it may be ruled on again.

MR. SHERWOOD: At the time of pre-trial?

THE COURT: So the motion to amend is denied.

APPENDIX A-1

R 9508

MR. TULLAR: Do I understand, your Honor, that you considered you ruled as dismissing Pacific's claims of trademark infringement and of unfair competition against National?

THE COURT: Not unfair competition, but trademark infringement. In other words, my holding was that National was the owner of the mark, the registrant, that it was *incontestability*, that the rights of FUCE and Pacific were equal to the use of the mark but that did not prevent Pacific from maintaining an action against anyone who would unfairly compete. Now, if that is, and that was, the purpose of my ruling, I don't think that infringement becomes a material issue. I think if they have no right except as a licensee I *held* that they could not infringe against you, or you couldn't infringe against them, I should say. The licensor is tantamount to a landlord or landowner against whom no adverse possession or possessive rights could be obtained, and therefore there would be no infringement, I mean, that is the intent of my holding, that is what I intended to express. If I didn't, I am sorry.

R 9517

THE COURT: It seems to me as though under the rulings that I have made in connection with the exclusiveness feature that it has eliminated the infringement and pendant unfair competition as a statutory cause of action.

MR. SHERWOOD: As based on the Lanham Act.

THE COURT: That is, as I understood, was my ruling.